

through June 11, 2012, for which she was without fault, because she received schedule award compensation to which she was not entitled; and (3) whether OWCP properly denied appellant's request for waiver of recovery of the overpayment.

FACTUAL HISTORY

On November 17, 2010 appellant, then a 47-year-old rural carrier associate, filed an occupational disease claim (Form CA-2) alleging that she developed impingement syndrome, arthritis, and tendinitis due to factors of her federal employment. She indicated that she first realized her condition was causally related to factors of her federal employment on October 15, 2010. OWCP accepted the claim for right shoulder rotator cuff tendinitis and right shoulder partial tear of bursal surface supraspinatus. Appellant underwent OWCP-authorized right shoulder arthroscopies on April 7, 2011 and December 30, 2016. OWCP paid her intermittent wage-loss compensation on the supplemental rolls from April 7 through December 17, 2011 and June 3, 2012 through October 31, 2018.

On August 20, 2011 appellant filed a claim for compensation (Form CA-7) for a schedule award.³

By decision dated December 9, 2011, OWCP granted appellant a schedule award for 12 percent permanent impairment of the right upper extremity. The award ran for a period of 37.44 weeks from September 23, 2011 through June 11, 2012.

On February 16 and June 16, 2017 appellant filed Form CA-7 claims for an additional schedule award.

Appellant submitted a July 11, 2017 report from Dr. James P. Emanuel, a Board-certified orthopedist, who noted that appellant reached maximum medical improvement (MMI) on June 5, 2017. On December 30, 2016 Dr. Emanuel reported performing arthroscopic rotator cuff repair, arthroscopic subacromial decompression, and arthroscopic distal clavicle resection. On June 5, 2017 he noted inspection of the right shoulder was within normal limits, no atrophy, no ecchymosis, no muscle asymmetry, no scapular winging, well-healed shoulder arthroscopic portals, nontender acromioclavicular (AC) joint, shoulder range of motion within normal limits, strength testing 5/5, negative impingement sign, and negative anterior and posterior test. Dr. Emanuel opined that appellant had 20 percent permanent disability of the upper right extremity as it related to the right shoulder. He noted 3 percent of the rating was related to preexisting changes and 17 percent was directly related to her work injury.

On August 21, 2018 OWCP referred appellant's case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested that he review Dr. Emanuel's July 11, 2017 report and provide an opinion on permanent

³ On November 10, 2011 Dr. Daniel D. Zimmerman, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), noted that appellant had two significant diagnoses, a rotator cuff tear and biceps tendinitis. He determined that status post clavicle excision provided the higher rating and therefore was used for his right upper extremity impairment calculation of 12 percent.

impairment under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ On August 27, 2018 Dr. Harris diagnosed status post right shoulder arthroscopic subacromial decompression, distal clavicle excision and rotator cuff debridement, April 7, 2011; and status post right shoulder rotator cuff repair, subacromial decompression, and distal clavicle resection with removal of cartilage from the acromioclavicular joint, December 30, 2016. He applied the diagnosis-based impairment (DBI) method of evaluating permanent impairment to find that, under Table 15-5 (Shoulder Regional Grid), page 403, appellant had 10 percent permanent impairment of the right upper extremity for having undergone arthroscopic surgery including excision of distal clavicle. Dr. Harris noted that appellant had satisfactory range of motion and therefore zero percent permanent impairment based on the range of motion (ROM) method. In referencing Dr. Emanuel's July 11, 2017 report, he noted that although the physician found 20 percent impairment of the right upper extremity he failed to provide any explanation for the impairment calculation. Dr. Harris indicated that appellant was previously awarded a 12 percent impairment of the right upper extremity and was not entitled to an additional impairment award.

OWCP determined that a second opinion examination regarding appellant's permanent impairment was necessary. On September 20, 2018 it referred appellant for this purpose to Dr. Richard T. Katz, a Board-certified orthopedic surgeon. In a report dated October 31, 2018, Dr. Katz determined that appellant had five percent permanent impairment of her right upper extremity under the DBI rating method of the A.M.A., *Guides*. He noted range of motion findings for the left and right shoulder of flexion of 180 degrees, extension of 50 degrees, internal and external rotation of 90 degrees, abduction of 180 degrees, and adduction of 50 degrees. Dr. Katz noted no anterior or lateral impingement, no drop sign, negative Hawkins test, negative cross arm test, no pain upon palpation of the AC joint, no evidence of inferior, anterior, or posterior instability, negative apprehension sign, and intact biceps muscle. He utilized the DBI rating method to find that, under Table 15-5, page 403, the class of diagnosis (CDX) for appellant's full-thickness rotator cuff tear with good strength and normal motion resulted in a class 1 impairment with a default value of three percent. Dr. Katz derived a grade modifier for physical examination (GMPE) of 1 due to a mild problem. He noted the grade modifier for functional history (GMFH) was 3 due to severe problem. Dr. Katz utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) = (3 - 1) + (1 - 1) = +2$, which resulted in a grade D or five percent permanent impairment of the right upper extremity. He advised that the *QuickDASH* score was more than two grades different than the physical examination findings and considered invalid and therefore would not be used in the impairment rating.

On December 27, 2018 OWCP referred appellant's case back to Dr. Harris serving as an OWCP DMA. It requested that he review Dr. Katz's October 31, 2018 report and provide an opinion on permanent impairment under the A.M.A., *Guides*. In a December 31, 2018 report, Dr. Harris, referring to his August 27, 2018 report, applied the DBI impairment method of evaluating permanent impairment to find that, under Table 15-5 (Shoulder Regional Grid), page 403, appellant had 10 percent permanent impairment of the right upper extremity for having undergone arthroscopic surgery including excision of distal clavicle. He noted that appellant had satisfactory range of motion and therefore zero percent impairment based on the ROM method.

⁴ A.M.A., *Guides* (6th ed. 2009).

Dr. Harris opined that appellant's condition improved based on the information in Dr. Katz' October 31, 2018 report.

By decision dated March 18, 2019, OWCP denied appellant's claim for an additional schedule award. It determined that she had not met her burden of proof to establish greater than 12 percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

In an overpayment referral to senior claims examiner dated April 8, 2019, OWCP indicated that a potential overpayment was identified. It occurred because on November 10, 2011, the DMA found appellant had 12 percent permanent right upper extremity impairment and upon further development, including referring appellant for a second opinion examination, on August 27, 2018 the DMA found 10 percent permanent right upper extremity impairment as appellant's condition "has improved." OWCP noted that since appellant was originally paid for 12 percent permanent right upper extremity impairment and was only due 10 percent permanent impairment for the right upper extremity, she was overpaid.

In a preliminary overpayment determination dated April 8, 2019, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$4,783.35 for the period September 23, 2011 through June 11, 2012, because she was overpaid for her schedule award. It explained that she received \$28,700.02 for 12 percent permanent impairment of the right upper extremity when she was only entitled to \$23,916.67 for 10 percent permanent impairment of the right upper extremity because her condition had improved, creating an overpayment of compensation for the period September 23, 2011 through June 11, 2012. OWCP also made a preliminary overpayment determination that she was without fault in the creation of the overpayment. It advised appellant that she could submit evidence challenging the fact or amount of the overpayment, or request waiver of recovery of the overpayment. OWCP informed her that she could submit additional evidence in writing or at a precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that appellant complete and return an overpayment recovery questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of recovery of the overpayment. OWCP requested that she submit supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver of recovery of the overpayment if she failed to furnish the requested financial information within 30 days.

On April 9, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review from the March 18, 2019 additional schedule award denial. On April 18, 2019 OWCP received an April 12, 2019 overpayment action request form. Appellant requested a decision be based on the written evidence regarding possible waiver of recovery of the overpayment. She indicated that she was requesting waiver of recovery of the overpayment because she was found to be without fault and had no knowledge that her shoulder condition had improved. Appellant submitted a partially completed overpayment recovery questionnaire, signed on April 12, 2019. She reported no monthly income, \$4,405.00 in the monthly expenses, and \$100.00 in assets (cash, checking account, and savings account). Appellant's monthly expenses consisted of \$1,200.00 for rent/mortgage, \$800.00 for food, \$300.00 for clothing, \$750.00 for

utilities, \$155.00 for credit card payments, and \$1,200.00 for miscellaneous expenses. She submitted several paystubs.

A telephonic hearing was held on August 1, 2019 regarding the March 18, 2019 decision denying an additional schedule award. By decision dated October 10, 2019, OWCP's hearing representative affirmed the March 18, 2019 decision, finding that appellant had no greater than 10 percent permanent impairment of her right upper extremity for which she had previously received a schedule award.

A prerecoupment hearing was held on February 7, 2020. By decision dated March 12, 2020, OWCP's hearing representative finalized the preliminary overpayment determination of April 8, 2019, finding that appellant was overpaid in the amount of \$4,783.35 for the period September 23, 2011 through June 11, 2012, because she received schedule award compensation for 12 percent permanent impairment of the "RLE,"⁵ Although the evidence established that she now had 10 percent permanent impairment. The hearing representative determined that although appellant was not at fault in the creation of the overpayment, the overpayment was not subject to waiver because appellant did not provide the requested information regarding income, expenses, and assets necessary to determine whether recovery of the overpayment would defeat the purpose of FECA, or be against equity and good conscience. A calculation of the overpayment was not provided. The hearing representative noted that appellant was not in receipt of compensation and has no entitlement to accrued compensation. She required recovery of the overpayment in installment payments in the amount of \$150.00 a month.

OWCP issued another "Final Overpayment Decision" dated March 16, 2020, and finalized the preliminary overpayment determination, finding that appellant was overpaid in the amount of \$4,783.35 for the period September 23, 2011 through June 11, 2012, because she received schedule award compensation for 12 percent permanent impairment of the right arm although the evidence established that she now had 10 percent permanent impairment. It noted that appellant had been paid \$28,700.00 for 12 percent permanent impairment to the right upper extremity for the period September 23, 2011 through June 11, 2012. However, appellant was only due 10 percent permanent impairment of the right upper extremity, which ran for a period of 31.20 weeks totaling \$23,916.67. The difference between these two figures, \$4,783.35, represented the amount of the overpayment. OWCP determined that, although appellant was not at fault in the creation of the overpayment, the overpayment was not subject to waiver because appellant did not provide the requested information regarding income, expenses, and assets necessary to determine whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. It noted that she was not in receipt of continuing compensation and required recovery of the overpayment in voluntary installment payments in the amount of \$150.00 a month.

On April 7, 2020 appellant submitted another overpayment action request form and requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review regarding the overpayment.

⁵ This appears to be a typographical error as appellant's schedule award pertains to the right upper extremity.

In a letter dated May 6, 2020, OWCP acknowledged appellant's second request asking for another hearing regarding the overpayment determination and waiver of recovery of the overpayment. It advised that a hearing decision was issued on March 12, 2020 and the final overpayment determination was issued on March 16, 2020.

In a statement, appellant disagreed with the overpayment determination and asserted that she was not at fault. She asserted that OWCP's referral physician examined her for only 10 minutes and made biased statements to benefit OWCP. Appellant asserted that the process was corrupt and unfair and she was unable to repay the overpayment. She indicated that she continued to have problems with her shoulder.

By decision dated July 21, 2020, OWCP, on its own motion, set aside the March 12, 2020 decision and modified the March 16, 2020 final overpayment determination to correct a technical error concerning the interest rate on the rate of recovery.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,⁶ and its implementing federal regulation,⁷ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the CDX is determined from the Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰ Under Chapter 2.3, evaluators

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ See A.M.A., *Guides* (6th ed. 2009) 405-12. Table 15-5 also provides that, if motion loss is present for a claimant with certain diagnosed conditions, permanent impairment may alternatively be assessed using Section 15.7 (ROM impairment). Such a ROM rating stands alone and is not combined with a DBI rating. *Id.* at 401-05, 475-78.

are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹¹

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with OWCP's DMA providing rationale for the percentage of impairment specified.¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish greater than 10 percent permanent impairment of her right upper extremity.

The Board has carefully reviewed the July 11, 2017 report of Dr. Emanuel, appellant's treating physician, who determined that appellant had 20 percent permanent disability of the upper right extremity, three percent of the rating that was related to preexisting changes and 17 percent directly related to her work injury. Dr. Emanuel's permanent impairment evaluation lacks substantial explanation as he provided an impairment rating for the right upper extremity, but he did not provide an adequate explanation for these ratings, which included specific references to the sixth edition of the A.M.A., *Guides*. The Board has held that an opinion on permanent impairment is of limited probative value if it is not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.¹³

OWCP thereafter referred appellant to Dr. Katz for a second opinion evaluation. Referring to the sixth edition of the A.M.A., *Guides*, in his October 31, 2018 report, Dr. Katz calculated appellant's percentage of permanent impairment of the right upper extremity for the diagnosis of rotator cuff injury, full-thickness tear. Using the DBI method, he noted GMPE of 1 and GMFH of 3, for five percent impairment of the right upper extremity.

In accordance with its procedures, OWCP properly routed the case record back to its DMA, Dr. Harris, who indicated that he had reviewed Dr. Katz' October 31, 2018 report. Dr. Harris correctly applied the DBI impairment method of evaluating permanent impairment to find that, under Table 15-5 (Shoulder Regional Grid), page 403, appellant had 10 percent permanent impairment of the right upper extremity for having undergone arthroscopic surgery including excision of distal clavicle. He determined that this diagnosis more appropriately described appellant's condition, was supported by the medical evidence, and provided a higher impairment

¹¹ *Id.* at 23-28.

¹² *See supra* note 9 at Chapter 2.808.6(e) (March 2017).

¹³ *See N.A.*, Docket No. 19-0248 (issued May 17, 2019); *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

rating. Dr. Harris noted that appellant had satisfactory range of motion and therefore zero percent impairment based on the ROM method.

The Board finds that the DMA properly applied the standards of the A.M.A., *Guides* to the physical examination findings of Dr. Katz. The DMA accurately summarized the relevant medical evidence including findings on examination, and reached conclusions about appellant's conditions that comported with these findings.¹⁴ The DMA properly referred to the A.M.A., *Guides* in calculating appellant's percentage of permanent impairment of the right upper extremity based on status post distal clavicle resection. As his report is detailed, well rationalized, and based on a proper factual background, the DMA's opinion represents the weight of the medical evidence. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides*, demonstrating a greater percentage of permanent impairment of the right upper extremity. Accordingly, the Board finds that, as appellant has not submitted medical evidence establishing more than 10 percent permanent impairment of the right upper extremity, she has not met her burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA¹⁵ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹⁶ Section 8129(a) of FECA provides, in pertinent part: "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."¹⁷

If a claimant received a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.¹⁸ Claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.¹⁹

¹⁴ *M.S.*, Docket No. 19-1011 (issued October 29, 2019); *W.H.*, Docket No. 19-0102 (issued June 21, 2019); *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

¹⁵ 5 U.S.C. § 8101 *et seq.*

¹⁶ *Id.* at § 8102(a).

¹⁷ *Id.* at § 8129(a).

¹⁸ *Supra* note 9 at Chapter 2.808.9(e) (February 2013).

¹⁹ *Id.* See also *W.M.*, Docket No. 13-0291 (issued June 12, 2013).

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$4,783.35 for the period September 23, 2011 through June 11, 2012, for which she was without fault, because she received schedule award compensation to which she was not entitled.

In the present case, appellant received \$28,700.02 in schedule award compensation for 12 percent permanent impairment of her right upper extremity. However, for the reasons explained above, appellant was only entitled to receive \$23,916.67 in schedule award compensation for 10 percent permanent impairment of her right upper extremity. The difference between these two amounts, \$4,783.35, constitutes an overpayment. As noted above, OWCP's procedures allow for the declaration of such an overpayment as both awards were calculated under the same edition of the A.M.A., *Guides*. Therefore, OWCP properly determined that appellant received a \$4,783.35 overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."²⁰ Section 10.438 of OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.²¹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver of recovery of the overpayment must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²² However, appellant had the responsibility to provide financial information to OWCP,²³ but failed to do so.

In its April 8, 2019 preliminary overpayment determination, OWCP requested that appellant provide a completed Form OWCP-20 and supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records to support income and expenses. It advised her that it would deny waiver of

²⁰ 5 U.S.C. § 8129.

²¹ 20 C.F.R. § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

²² *Id.* at § 10.436.

²³ *Id.* at § 10.438; *S.P.*, Docket No. 19-1318 (issued July 31, 2020).

recovery if he failed to furnish the requested financial information within 30 days. Appellant did not provide a completed Form OWCP-20 or submit sufficient financial information necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

Accordingly, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.

With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits.²⁴ As appellant was not in receipt of continuing compensation benefits required recovery of, the Board does not have jurisdiction over the method of recovery of the overpayment in this case.²⁵

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish greater than 10 percent permanent impairment of her right upper extremity. The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,783.35 for the period September 23, 2011 through June 11, 2012, for which she was without fault, because she received schedule award compensation to which she was not entitled. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

²⁴ *L.L.*, Docket No. 19-0097 (issued March 20, 2020); *A.B.*, Docket No. 18-0915 (issued October 24, 2018).

²⁵ *See id.*; *Miguel A. Muniz*, 54 ECAB 217 (2002); *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

ORDER

IT IS HEREBY ORDERED THAT the March 16 and July 21, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 24, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board